No. 17-1299

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission (the Commission)[1] respectfully submits this brief in support of the petitioner, California Franchise Tax Board, asking the Court to grant certiorari to overturn *Nevada v. Hall*. The Commission, created in 1967 by the Multistate Tax Compact,[2] promotes interstate cooperation by, among other things, providing a forum for state tax administrators to draft uniform tax laws, conduct joint audits, and facilitate the settlement of unreported business taxes.[3]

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. Counsel for both parties received timely notice of the *amicus*'s intent to file this brief and granted their consent to the filing thereof.

[2] *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978)(upholding the Compact).

[3] The Commission is made up of the tax agency heads of states that have adopted the Compact by statute. In addition to these sixteen compact members, thirty-three states are sovereignty or associate members. *Compact members* are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. *Sovereignty members* are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. *Associate Members* are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming. Information on the

As this case demonstrates, *Hall's* derogation of state sovereign immunity threatens state tax enforcement and undermines interstate cooperation.

SUMMARY OF ARGUMENT

The petitioner argues *Hall's* cramped notion of state sovereign immunity conflicts with *Seminole Tribe v. Florida* and *Alden v. Maine*. We agree. *Hall* likened states to "independent and completely sovereign nations," dismissing the essential role immunity long played in our federal system as an "inference from the structure of our Constitution and nothing else." *Nevada v. Hall*, 440 U.S. 410, 417, 427 (1979).

True, the precise issue is not explicitly addressed in our Constitution's *text*. The inference to be drawn, however, is not from our Constitution's *structure*, but from the exacting imperative of its Full Faith and Credit Clause: A state must give conclusive effect to the judgment of a sister-state's court, even if it is based on contrary or conflicting law.

Because of *Hall*, this imperative now holds even when the defendant is the state itself. When a defendant state's immunity is subject to the discretion of its sister-state's court, the state is consequently subject to the sister-state's procedural and policy choices. This is a quantum of power no sovereign would willingly cede to another. *Hall's* denigration of the states' immunity, so consequential to the balance struck under our federal system, and maintained for

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Commission and its programs is available on its website: http://www.mtc.gov/Home.aspx.

two centuries, ought not be based, as it was, solely on the lack of explicit Constitutional text, and nothing else.

Cases since *Hall*, including this one, demonstrate the difficulties created by its aberrant holding, even where traditional tort claims are at issue. But the potential for mischief is perhaps greatest in the area of state taxes. *Hall* opens a path for plaintiffs to use out-of-state forums to collaterally attack tax enforcement efforts, alleging various claims and circumventing the specialized administrative processes established in every state to ensure that taxes are properly and timely collected, and that disputes are fairly resolved.

Hall's defenders do not deny this threat is real. Rather, they contend the proper solution is for states to enter into comprehensive reciprocal agreements to exercise comity, agreements that do not exist, in part, because for the first two centuries of the history of our Constitution, there was no need. But the problem with this solution is that the doctrine of comity itself makes such agreements more difficult, if not impossible, when, as in the tax area, the state policies compete. And, ironically, the compromises necessary to reach such agreements will likely be hampered by the very conflicts that *Hall* potentially creates.

ARGUMENT

I. Hall opens a path for putative taxpayers to disrupt state tax enforcement.

A. States have specialized administrative processes and procedures to resolve tax disputes while ensuring tax collection.

Federal and state governments have instituted specialized administrative processes for resolving tax matters through the explicit waiver of sovereign immunity. *U.S. v. Williams*, 514 U.S. 527, 531 (1995); *Patterson v. Gladwin Corp.*, 835 So.2d 137 (Ala. 2002); and *Northwall v. State, Dep't of Revenue*, 637 N.W.2d 890 (Neb. 2002). Governments depend on exhaustion of these administrative remedies to ensure that revenues are timely collected and that disputes, which are frequent, can be fairly resolved. *See Owner-Operators Indep. Drivers Ass'n of Am. v. State*, 553 A.2d 1104 (Conn. 1989); and *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006). States, themselves, must follow these processes in order to obtain a final enforceable tax liability against a taxpayer. *See* CAL. REV. & TAX. CODE §§ 19044 and 21011.

Of course, a taxpayer cannot bring suit in state courts against the federal government, seeking to resolve a tax-related matter. 28 U.S.C. § 1346(a)(1). *See also P.C. Monday Tea Co. v. Milwaukee County Expressway Comm'n*, 139 N.W.2d 26, 29-30 (Wis. 1966)(holding that state courts lack such authority). The conflicts and difficulties this would cause are obvious.

This Court has long recognized the fundamental role that these specialized administrative processes play in tax enforcement, and thus, in funding state governments. Two years after *Hall*, the Court was faced with the question of whether federal courts could dismiss state-tax-related § 1983 claims where there was a failure to exhaust the taxing-state's administrative remedies. *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981). The majority in *McNary* concluded federal courts should exercise comity to dismiss such suits, observing that the doctrine of restraint "carried particular force, in suits challenging the constitutionality of state tax laws." *Id.* at 108 (internal citations omitted). The majority also noted: "In addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114. As the Court recognized, maintenance of the suit would take up limited administrative resources, have a chilling effect on administrative actions, and lead to the inevitable suspension of collection efforts. *Id.* at 115.

In *McNary*, four justices disagreed that the exercise of comity was possible, noting the imperative set out in § 1983. But they nevertheless concurred in the judgment, concluding that § 1983 should be interpreted to allow federal courts to dismiss tax-related suits if the plaintiff had not properly exhausted state administrative processes. Critically, the concurrence also said this: "While the 'principle of comity' may be a source of judicial policy, *it is emphatically no source of judicial power to renounce jurisdiction.*" *Id.* at 119 (Brennan, J. concurring, emphasis added). We return to this issue in Section II.

B. There are significant incentives to sue a taxing state in an out-of-state court, even if the suit may not succeed.

As *McNary* recognized, putative taxpayers can obtain advantages by suing the taxing state in another forum, delaying, disrupting, or deterring administrative proceedings. Even if the taxing state initiates such proceedings—and indeed it may have no choice if tax liabilities are to be established within statutory guidelines and timelines—those proceedings can be undermined by the out-of-state suit. For example, the out-of-state suit gives the plaintiff a basis to resist informal requests for information or even subpoenas from the taxing state. The plaintiff may also petition the trial court, as Mr. Hyatt did here, to issue protective orders preventing the use of documents necessary for the tax proceeding.[4] Taxing-state officials and employees can be required to submit to depositions and document production. Moreover, some critical rules, such as statutes of limitation, have been held to be procedural. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727-728 (1988); *Sam v. Sam*, 134 P.3d 761 (N.M. 2006). *See also* Restatement (Second) of Conflict of Laws § 122 (1971).

Plaintiffs may also attempt to persuade the sister-state's court to disregard the taxing state's regulations and rulings as well as other public acts or doc-

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[4] *Franchise Tax Bd. of California v. Dist. Ct.*, 105 P.3d 772 (Nev. 2002) (unpublished table decision), available at: http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=5165&csIID=5165&deLinkID=184207&sireDocumentNumber=02-05994.

uments, such as tax notices, assessments, etc., that would have substantial weight in the taxing state's own forum. If the court does so, that decision will typically be subject to review only under the most lenient of standards—abuse of discretion. *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998)(holding that unlike the preclusive effect of a judgment, enforcement measures remain subject to the forum state's law); *Hyatt v. Franchise Tax Bd.*, 962 N.Y.S 2d 282 (N.Y. App. Div. 2013) (holding that California's administrative subpoena was not entitled to full faith and credit and that a court may decline, under the doctrine of comity, to enforce a subpoena unless it conforms to the forum state's rules). Nor would the eventual administrative ruling of an administrative forum, which is granted limited jurisdiction, be entitled to preclusive effect. *See Thomas v. Washington Gas Light Company*, 448 U.S. 261 (1980)(holding that Full Faith and Credit principles do not apply to administrative agency rulings in the same way they would apply to state court judgments). So even if the defendant state were to proceed with enforcement through an administrative proceeding, the ruling of the administrative tribunal might not be entitled to any effect in the out-of-state suit. This not an insignificant problem for the states. At least thirty-three states have specialized tax tribunals to hear tax disputes, separate from the state's courts of general jurisdiction.[5]

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[5] *See* AICPA Chart of States With and Without State Tax Tribunals (Current as of 2/3/2016), available at: https://www.aicpa.org/Advocacy/State/DownloadableDocuments/Chart-of-States-with-and-without-State-Tax-Tribunals.pdf .

Given these incentives, therefore, we must expect such suits will occur, especially where the plaintiff has resources and the asserted tax liability is significant. Nor will potential obstacles to successful prosecution remove this incentive, since successful prosecution is not the goal. There have been, for instance, persistent attempts to sue state tax agencies in the federal courts of a taxing state, despite the doctrines of comity and abstention, and the jurisdictional bar imposed by the Tax Injunction Act.[6] *See id.* at 102; *Hibbs v. Winn*, 542 U.S. 88, 104 (2004); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331 (1990); *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

Moreover, the incentive to bring suit in the courts of another state will be significantly greater. As discussed further below, when the forum is in another state, the plaintiff may assert claims under that state's law, which the court must consider. (This would also include the federal courts sitting in that state, where there is no jurisdictional bar.) Also, unlike the federal § 1983 claims under *McNary*, there is nothing in *Hall* or this Court's precedents that would require state or federal courts to recognize the need for exhaustion before such state-based claims can be brought.

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[6] 28 U.S.C. § 1341.

C. Conflict of law issues create special problems that can be exploited in the state tax area.

An out-of-state court in a suit against a defendant state must determine, under the rules for conflicts of law, whether to apply the substantive laws of the defendant or the forum state. The court must, therefore, have some understanding of the defendant state's law and its effect on the issues in suit. But unlike the law of torts, state tax policies differ, in part, as a result of a "healthy form of rivalry." *See Zobel v. Williams*, 457 U.S. 55, 67 (1982). Here, of course, California imposes an individual income tax, along with all of the concomitant substantive and procedural rules, while Nevada does not. This is the very kind of conflict in public policy that entitles Nevada courts to favor Nevada's own policy choices. Nor will the Nevada court's ruling necessarily affect its own administration of taxes.

If the court chooses to apply the defendant state's laws, there is no guarantee it will do so correctly. If it misconstrues that law, this does not implicate full faith and credit unless the mistake contradicts an established interpretation and is brought to the court's attention during the litigation. *See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917) and *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914). Also, the defendant state's appellate courts will have no opportunity to review the court's application of its laws, creating the potential for persistent conflicts in interpretations that can be further exploited.

If, instead, the court chooses to apply the forum-state's law, it need not demonstrate that the forum state had the majority of the contacts with the issue. For example, in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), this Court held a Minnesota court properly applied Minnesota law to a case involving an out-of-state accident and the death of an out-of-state resident, in part because the plaintiff (the decedent's wife) had moved to Minnesota after the accident. *Id.* at 318-319. Nor would the choice to apply the forum-state's law normally implicate the Full Faith and Credit Clause, *Id.* at 323 (Stevens, J. concurring), unless, as this Court has previously held, the court adopted a "policy of hostility" to the laws of the defendant state. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003). But, of course, such hostility is in the eye of the beholder. *See Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1286 (2016)(Roberts, C.J., dissenting).

Whichever law the court applies, its judgment will have preclusive effect for the issues litigated. A defendant state will not ordinarily be able to refuse to give effect to a judgment by another state's court, so long as the question of jurisdiction was fully and fairly litigated in that court. This Court has held, for example, that a federal court cannot consider whether a state court had jurisdiction to decide an issue if the state court itself fully considered the question of jurisdiction. *Durfee v. Duke*, 375 U.S. 106 (1963). *See also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691 (1982) (holding that North Carolina could not deny enforcement of an Indiana court judgment

even if it found the Indiana lacked subject-matter jurisdiction).

II. States cannot solve these problems through reciprocal agreements to exercise comity.

At best, comity imposes on an out-of-state court a difficult and complex decision. While the assertion of sovereign immunity simply requires the court to determine if the defendant-state agencies or officials are clothed in that immunity, no court can properly exercise comity to dismiss a suit without first considering other substantive issues including: the claims asserted, which state's law should apply, what that law requires, whether the forum state or the defendant state has waived immunity, etc. See, for example, the lengthy analysis of a federal magistrate sitting in Maine (in a non-tax matter), determining whether Maine's courts would exercise comity to dismiss claims against Connecticut and its officials. Amended Recommended Decision on Motion to Dismiss, *Hoffman v. Connecticut*, 2009 BL 376197, 3 (D. Me. Aug. 07, 2009).

The exercise of comity, therefore, is not a simple matter. It first requires the court consider issues which may be novel and complex. *See also Beard v. Viene*, 826 P.2d 990, 995 (Alaska 1992)(noting that comity is not the end, but the "beginning of the analytical process") *and City of Raton v. Arkansas River Power Auth.*, 600 F. Supp. 2d 1130 (D.N.M. 2008)(analyzing, at length, the factors that New Mexico courts would consider in determining whether to dismiss a suit under comity). Moreover, the types of issues that must be considered are substan-

tive in nature, requiring the defendant state to put on substantive defenses and arguments.

Further, unlike a decision concerning sovereign immunity, an order granting or denying dismissal under comity may not be subject to interlocutory appeal, as it was here, creating uncertainty as to whether resolution of claims may be stayed until that issue is resolved. *See Atl. Coast Conference v. Univ. of Maryland*, 751 S.E.2d 612, 616-617 (N.C. Ct. App. 2013)(deciding to grant interlocutory appeal while acknowledging that there was no right to such appeal under state law). Even where appeal is granted, this will only create more delays, as this case demonstrates.

Or take the case of *Schoeberlein v. Purdue University*. There, the question was whether a suit by an Illinois plaintiff against an Indiana university had been properly dismissed. The intermediate appellate court, in a split decision, reversed the dismissal. But the Illinois Supreme Court overturned that ruling, with one justice dissenting. The state's high court considered a number of factors for and against granting dismissal. It also noted that states' courts were split on the weighing of particular issues in favor or against dismissal. 544 N.E.2d 283 (Ill. 1989). *See also Biscoe v. Arlington Cnty.*, 738 F.2d 1352, 1360 (D.C. Cir. 1984)(describing how states faced with claims of immunity have resolved the issue by reference to the forum state's policy on comity, "not by rigid application of choice of law rules").

But even more critically, courts cannot exercise comity to grant dismissal if the forum state's interests

are sufficiently important. In other words, in the very cases where it matters, where the laws of the forum and defendant state conflict, the forum state's court will have no discretion. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140, 1144 (N.Y. 2006)(reasoning that it is when there is "no material conflict" between forum-state and defendant-state policies that "our courts of course remain open to reasonable deference to the law of another jurisdiction . . .."). The doctrine of comity, as it is apparently recognized in a number of, if not most, states, requires that the court *not* dismiss a case where the state's important policies are implicated. *See Head v. Platte County*, 749 P.2d 6 (Kan. 1988)(holding that, in a suit against a sheriff in Missouri for acts committed in Missouri against a Kansas resident, "No state should give effect to the law of another on principles of comity when the effect would be deleterious to the public policy of the forum state.") Indeed, as the concurrence in *McNary* expressed, when lawmakers have indicated that their policies are important enough, comity provides no power to renounce jurisdiction. *McNary* at 119.

States' lawmakers, of course, may express a policy of restraint, or reciprocal restraint, but are unlikely to wish to do so through blanket policies covering all issues, even in a given area. Nor can such agreements provide a comprehensive solution, even on particular issues, unless virtually every state joins. Such cooperative efforts can take decades, or longer, to hammer out, and state lawmakers may be inclined to let state courts continue grappling with the issues in the hopes that such case-by-case analysis will provide answers. States cannot, therefore, be

faulted for failing to develop these comprehensive cooperative solutions, given they were unaware of the need until *Hall*. More critically, *Hall's* defenders can point to no evidence that the solution is practical or that states will adopt a "wise policy, as a matter of harmonious interstate relations." *Hall* at 426.

There is evidence, however, that states may seek to use *Hall* to promote their own competing tax policies, and that taxpayers may use it to pit states against each other. Take the case of *Crutchfield Corp. v. Christopher C. Harding, in his capacity as Massachusetts Commissioner of Revenue*, et al., No. CL17001145-00 (Va. Cir. Ct. Oct. 24, 2017). Virginia law now allows Virginia companies to file a constitutional challenge seeking a declaratory judgment against a government official of another state that asserts the company has sales and use tax collection obligations in the state.[7] Crutchfield Corp., an online vendor, filed a complaint in Virginia, where it is headquartered, against the Massachusetts revenue commissioner challenging the constitutionality and validity of the that state's law asserting a tax collection obligation. If the lesson states take from *Hall* is that they have the opportunity to project their policies onto their sister-sovereigns, this will inevitably

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[7] This law has been contentious since its inception; in its 2004 fiscal impact statement accompanying the change in law, the Virginia Department of Taxation questioned whether a declaratory judgment issued by a Virginia circuit court that prohibits an action — legal under the laws of another state — would interfere with the sovereignty of that other state. *See* Amy Hamilton, *Massachusetts Officials Say Crutchfield Can't Haul Them Into Virginia Court*, 87 STATE TAX NOTES 237 (Jan. 15, 2018).

undermine any cooperative solution, and may threaten other types of interstate cooperation, as well.

CONCLUSION

Hall disrupts our Constitution's long-established balance and threatens core state functions, such as tax enforcement. The only proffered solution—the reciprocal exercise of comity—cannot be achieved without state legislative action, and that will require a long, painstaking effort, with no guarantee of success. Nor will state competition or the conflicts that *Hall* creates make this process any easier. Rather, *Hall* is likely to undermine state cooperation. There is only one solution to the problems created by *Hall*. The decision must be overturned.

Respectfully submitted,

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